

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT ALAN FREEBURG,

Petitioner,

v.

DONALD HOLBROOK,

Respondent.

Case No. C12-376-JLR-BAT

**REPORT AND
RECOMMENDATON**

Respondent moves to stay and abey this federal habeas proceeding (Dkt. 14) because petitioner filed a pending state collateral attack contemporaneously with his 28 U.S.C. § 2254 habeas petition, the state collateral attack may exhaust certain issues or moot the federal petition, and relevant state-court records cannot be retrieved while the state collateral attack is pending. Petitioner has not filed an opposition.

Earlier, the Court granted respondent a second extension of time to file an Answer but noted that it was not inclined to grant a third without information from the parties about whether this matter should be stayed, dismissed without prejudice based on the pending state proceeding, or evaluated on the merits. (Dkt. 13.) The Court now finds good cause to stay this matter while petitioner exhausts his state-court remedies. In his petition, petitioner notes that he has filed a number of successful and unsuccessful attacks on his 2002 conviction, which raises the

possibility that he filed his federal action as a “protective petition” so that he would not run afoul of the federal statute of limitations should his most recent state collateral attack be dismissed. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005); *see also* 28 U.S.C. § 2244(d)(1)(A); *cf. Smith v. Ratelle*, 323 F.3d 813 (9th Cir. 2003) (holding that the district court abused its discretion by summarily dismissing a mixed habeas petition because the one-year statute of limitations affected petitioner’s ability to raise his fully exhausted claims at a later date).

The Court recommends **GRANTING** respondent’s unopposed motion to stay and abey this proceeding until 30 days after the issuance of the certificate of finality in the state-court proceeding. (Dkt. 14.) The parties should be required each to file a status report with the undersigned magistrate judge **120 days** after the Order adopting this Report and Recommendation, and then every **120 days** thereafter. Respondent’s Answer should be filed within 45 days after the stay is lifted.

Because respondent’s motion to stay is unopposed, this Report and Recommendation may be considered and adopted by the District Judge immediately. A proposed Order is attached.

DATED this 19th day of July, 2012.



BRIAN A. TSUCHIDA
United States Magistrate Judge